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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

HONOLULU PLANTATION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The Honolulu Plantation Company prays that a Writ of Certiorari issue to review that portion of the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on April 24, 1950, reversing the judgment of the United States District Court for the District of Hawaii.

OPINIONS BELOW

The decision of the District Court and judgment are printed at R. 461-507, the decision being reported in 79 F. Supp. 903. The opinion of the Circuit Court of Appeals (R. 1626-1642) is reported in ..... F. 2d. .....

JURISDICTION

The Court has jurisdiction to review said decision under Section 240, Judicial Code (28 U.S.C. 347a).

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals for the Ninth Circuit erred in reversing a decision of the District Court of Hawaii awarding severance damages in condemnation proceedings to petitioner as and for damages suffered by its remaining properties, where prior to the government taking there existed a going, efficient and profitable sugar plantation enterprise, held together in a unity of use by an integration and combination of property interests, fee simple and leasehold, tangible and intangible, held and owned by petitioner, and where after the Federal Government takings of lands held by petitioner under long term leases which lands furnished a very substantial part of the sugar cane upon which the petitioner's mill and other remaining properties depended for their continued efficient and profitable operation, there existed an inefficient and unprofitable sugar plantation enterprise causing a substantial diminution in the market value of the remaining properties and the rights therein held and owned by petitioner and resulting in the ultimate disintegration and dissolution of its enterprise.

2. Whether the Ninth Circuit Court's decision in reversing the decision of the District Court of Hawaii is in conflict with the decision of the First Circuit Court of Appeals in the case of *U. S. v. Baetjer,* 143 F. 2nd 391, cert. denied, 323 U.S. 772 (1944), decided by the First Circuit Court of Appeals in 1944.

STATEMENT

Between June 21, 1944 and December 6, 1945, the United States instituted 13 separate condemnation proceedings against several defendants, including the Honolulu Plantation Company, which latter company was named as defendant in each and all of the 13 proceedings. The jurisdiction of the District Court was invoked under Section 201 of the Act of March 27, 1942, 56 Stat. 176, 177, 50 U.S.C. Sec. 171 (a).

An order and judgment of taking was entered by the Court in each of the 13 proceedings.

A motion for consolidation of seven of the 13 cases was filed by the Honolulu Plantation Company on February 17, 1945 (R. 427) and on the same day pursuant to a stipulation between counsel, an order of the Court was entered consolidating the seven proceedings in one proceeding (R. 433). A motion for consolidation of the remaining six proceedings was filed on October 9, 1946 (R. 442) and after a hearing on said motion on November 14, 1946, the Court granted said motion and on November 22, 1946, entered an order consolidating all 13 proceedings into one proceeding (R. 459).

From about the year 1899, the Honolulu Plantation Company, a California corporation, operated continuously a sugar plantation on the Island of Oahu, Territory of Hawaii, at Aiea, adjacent to Pearl Harbor. The principal operations of the enterprise were the growing of sugar cane and the processing of sugar therefrom. Because it leased all but a very small portion of the lands used in its operations, it was known in Hawaii as a leasehold plantation. Upon the lands so held, which were contiguous, it had constructed a sugar mill, a railroad system, a system of roads, camps for its employees, wells, pumps, irrigation systems, and other properties which formed a part of the sugar plantation enterprise.[1] The sugar mill and related facilities and the principal camps for employees were located on lands owned in fee by

[1] The improvements included the following: mill, refinery; warehouses; railroad system; electric plant; wells, pumps, pipe lines and ditches in the irrigation systems; housing for employees (551 houses); sewer systems in 10 camps; domestic water system; road system; 36-bed hospital; 2 clubhouses; gymnasium; office building; reservoir system; bridges and flumes. The industrial buildings included: main mill building; electric power house; sugar warehouse; raw sugar bin shed; bag shop; massecuite tank building; molasses tank building; laboratory; shop buildings; locomotive sheds; yeast plant buildings; etc. (R. 461, 479, 480, 483, 484, 490, 491, 532-551, 567, 568, 570-572, 576-577).

the Company, which lands were situated almost in the center of the integrated plantation. The wells, pumps and pumping stations which supplied the irrigation system with water were located on land owned in fee by the Company. All of these structures, fixtures, appurtenances and improvements were necessary to the maintenance and operation of a plantation for the growing of sugar cane and the processing of the cane into sugar. All of these properties were part of a single integrated property and were operated as a unit devoted as a whole to the raising of cane and the processing of that cane into sugar. The mill, railroads, roads, camps, wells, pumps, irrigation systems and other properties of the Company were constructed and built to operate a 35,000-ton plantation, i.e. to produce and manufacture 35,000 tons of sugar per year (R. 567).

In the year 1939, the year of the beginning of World War II, the United States began to take properties of the Honolulu Plantation Company for military and naval purposes. These properties were taken piecemeal, but up to the attack on Pearl Harbor on December 7, 1941, the takings had resulted in bringing the plantation down to about a 21,000-ton plantation (R. 569). As a result of the needs and demands of the Army and Navy after December 7, 1941, the Government in these present proceedings acquired some 1,364.35 acres, more or less, formerly held under lease or in fee by the Company of which 1,087.59 acres were sugar cane land devoted to the purpose of raising sugar cane. As a result of these takings, the cane acreage of the Company was reduced from about 4,397.34 acres to approximately 3,309.75 acres, and it was reduced from a 21,000-ton to about a 15,000-ton sugar plantation (R. 571).

As a result of the takings in these proceedings, the physical properties of the Honolulu Plantation Company remaining after the takings were greatly depreciated in value due solely to the severance of the lands involved in these takings

from the properties operated as a unit by the Company as a sugar plantation. The market value of all of the properties of the Company held before the takings and forming the integrated enterprise owned and conducted by the Company was far higher than the market value or the fair value of the properties of said integrated unit remaining after the takings. The difference between those values is the amount the Company suffered in damages by reason of the severance.

In its decision[2] (R. 461), the Trial Court ruled: (1) that the Honolulu Plantation Company was entitled to severance damages in the amount of $440,175 for the damages suffered by its remaining properties in respect to the taking of 440.175 acres leased by the Company under long term leases; (2) that Honolulu Plantation Company was not entitled to severance damages in connection with the remainder of 595.01 acres of land held under agreements to lease on the theory that the Company did not have an estate or interest in those lands which would entitle it to compensation in these proceedings. Judgment of the District Court was entered on November 5, 1947 (R. 504-507).

The United States appealed to the Circuit Court of Appeals for the Ninth Circuit to review that part of the judg-

[2] The Company produced four expert witnesses: Stafford L. Austin, former manager of the Company with a lifetime of experience in the field of producing and manufacturing sugar (see R. 526-529 for qualifications); Charles Campbell Crozier, Deputy Tax Commissioner of the Territory of Hawaii (see R. 835-839 for qualifications); George L. Schmutz, an expert of very great experience in all types of property valuation and of national reputation and standing and a leading author of textbooks in the field of appraisal and valuation (see R. 669-673 for qualifications); and Philip Edmund Spalding, president of one of the large sugar agencies in Hawaii, C. Brewer & Co., Ltd. (see R. 1040-1044 for qualifications), who testified at great length as to the severance and other damages, whereas the *Government produced no witnesses or evidence* whatsoever, except the testimony of John F. Child, Jr., an expert, who, however, testified only with respect to the value of certain small parcels of land taken and gave no testimony as to severance damages. Though the Company's witnesses testified that petitioner suffered damages in excess of $1,000,000, the Trial Court held that the Company was entitled to damages in the amount of $440,175.

ment awarding severance damages to the Honolulu Plantation Company in the amount of $440,175.00. A cross-appeal was taken by Honolulu Plantation Company to the United States Circuit Court of Appeals for the Ninth Circuit to review that part of the decision denying severance damages to the Company in connection with the remaining 595.01 acres of land.

The Ninth Circuit Court of Appeals in an opinion rendered and filed April 24, 1950 (R. 1626), (1) reversed the decision of the District Court for the District of Hawaii with respect to the award of severance damages to the Honolulu Plantation Company in the amount of $440,175.00; (2) affirmed the decision of the District Court denying damages as to the said 595.01 acres of land, holding that the Honolulu Plantation Company had no interest in these lands recognized by local law and dismissing the Company's cross-appeal; and (3) remanded the case to the Trial Court in order to determine whether there are other property rights involved for which the Company might be entitled to compensation. Judgment of the Appellate Court was entered April 24, 1950 (R. 1643-1644).

REASONS FOR GRANTING WRIT

This case presents questions of federal law relating to the meaning of the words "just compensation" in the 5th Amendment to the Constitution of the United States which questions have not been settled by this Court. An early authoritative decision on these questions is of paramount importance not only to the parties of this case but to the public generally. In addition to the novelty and importance of the issues presented, the opinion of the United States Circuit Court of Appeals for the Ninth Circuit should be reviewed because it is clearly erroneous and not in accord with the principles of the common law, the recent decisions of the Supreme Court of the United States, particularly *General Motors v. U. S.*, 323 U.S. 373; 89 L. Ed. 311 and *Kim-*

ball Laundry v. U. S., 93 L. Ed. 1420 (1949), and applicable decisions of several of the states of the United States and is in conflict with the decision of the First Circuit Court of Appeals in *Baetjer v. U. S.*, supra.

1. It is submitted to the Court that this case comes within the principles declared by this Court in the case of *Kimball Laundry Co.*, supra. The rationale of the Kimball Laundry Co. case is applicable to the instant case upon the following hypotheses:

The market value of the land utilized as a business site tends to equal an amount based upon the reasonably probable earnings of the business; and the value of plant and machinery specially designed and adapted for a business use exceeds the scrap value because they are income producing. The product of the contributions of land, plant and equipment produces the intangible known as going concern value.

Where a condemnor takes the fee title to business property the Fifth Amendment requires only that compensation be paid for the physical property condemned. Under such circumstances the sovereign need not compensate the owner for the going concern value of the business for a very obvious reason, i.e., because the going concern value has not been taken. The condemnee has the opportunity to establish his business elsewhere and thus to utilize such intangibles as managerial skill, goodwill and the like at a new location.

Where, however, there is present a going concern value in addition to the value of the business's physical property the Fifth Amendment requires compensation for the former as well as the latter.

In the instant case, petitioner owned and operated an integrated enterprise engaged in the production of sugar cane and the processing of that sugar cane into raw sugar. Prior to the takings herein the mill, railroads, roads, camps, wells, pumps, irrigation system and other properties of the Com-

pany were constructed and built to operate a 35,000-ton plantation, i.e., to produce and manufacture 35,000 tons of sugar per year. The lands, plant and machinery were specially adapted to the production and processing of the amount of sugar cane produced on approximately 4,300 acres of cane lands. Prior to the takings herein the Company was a profitable enterprise, enjoying a good prospect for the future. After the takings of approximately 1,000 acres in these proceedings petitioner was left with only about 3,000 acres of cane land. The record clearly shows that the plantation was unable to lease or purchase other cane lands with which to supply cane for its mill. As a result of the takings, the plantation's property had an uneconomic over-capacity with respect to the remaining cane lands available to supply the enterprise such that the plantation could not be operated by any one as efficiently as before the takings and such that the over-capacity depreciated the value of the mill and other plantation properties remaining after the takings.

The result is well phrased by the Trial Court in the following language:

"The ascertainment of the fair market value, or here in the absence of a market for sugar plantations, of 'fair value' in a condemnation proceeding is a very practical matter. While it is true that after these takings what was left was in just as good a condition, generally, as it had been the day before, it does not necessarily follow that it therefore is just as valuable. It is plain common sense that a buyer would pay for property what it is worth to him—buy at a figure at which he could reasonably foresee making a profit upon his investment. Considered in this practical light, I am satisfied by the evidence that the Company has proven its claim that its remaining property decreased in value at the rate of $1,000 an acre for each cane acre taken."

The rationale of the lower court's decision must therefore

be that the takings by the Government had the inevitable effect of depriving the owner of the going concern value of the business and the properties used in the integrated enterprise and thus there was a compensable "taking" of the property. It is believed that the *Kimball Laundry Co.* case, *supra,* establishes the rule that if such a deprivation occurs the Government is obligated to pay for the damages which result.

2. The opinion of the Appellate Court states that in a condemnation of a part of a tract of land just compensation represents the difference between the market value of the tract as a whole before condemnation less the market value of the portion that remains after the taking. The Appellate Court states further that this rule "applies exclusively to condemnation of fee simple title of a tract in one ownership." (R. 1630.) The latter principle limiting the application of "severance damages" exclusively to the condemnation of fee simple tracts in one ownership is not in accord with the common law and decisions of certain State Courts.

In *Chicago and E. R. Co. v. Dresel* (1884), 110 Ill. 89, the condemnee owned ten (10) lots in fee simple and occupied four (4) others by virtue of a lease. The condemnee occupied and utilized all of the lots as an entirety for an extensive hot-bed system of flower gardening. A railroad company condemned a right of way across the leased lots only, no part of the lots held in fee being taken. The Court held that the condemnee was entitled to recover the amount represented by the difference between the market value of the whole tract prior to the taking including the leasehold parcels and the market value of the entire tract after the taking.

In *Renwick, Shaw & Crossett v. Davenport and NWR Company* (1878), 49 Ia. 664, affirmed 102 U.S. 180, 26 L. Ed. 51, it was held that in assessing damages for a portion of a leasehold condemned for a railroad right of way, the

jury could consider the damages to the entire property of the lessee upon which he conducted a lumber business. The Court held that such damages were proper notwithstanding the fact that the property was divided by a highway running through it.

The authorities cited by the Appellate Court in support of its conclusion do not in fact support such a conclusion. The case of *City of Oakland v. Pacific Coast Lumber and Mill Company,* Cal. (1915), 153 P. 705, cited by the Court (R. 1640) in favor of the proposition that the "severance damage theory" is applicable only to fee lands in a single ownership actually supports the position of the petitioner. That case involved the condemnation of certain leased tide lands which defendant used in connection with his mill business. At the time of the commencement of the action the lease had 2 and ⅓rd years to run with an option of 6 years renewal. Defendant used this leased property for wharf and lumber yard purposes, the property constituting a valuable adjunct to the planing mill business which the defendant conducted on other property located some distance from the tide lands. Access to the planing mill and other property of the defendant from the leased tide lands was available only by means of a public highway, the leased lands being separated from the mill property by lands of other owners.

The lower Court instructed the jury that the award to the defendant "should be based upon the value (meaning thereby the market value in contemplation of its use) of the portion of the leasehold property taken, and the damages, if any, which resulted from that taking to the remainder of the leasehold." The Appellate Court in affirming the decision of the lower Court held that such an instruction was a proper one.

So far as we are able to determine, the precise ground on which the Circuit Court of Appeals reversed the District

Court has never been considered by the Federal Courts. In its opinion (R. 1640) the Appellate Court states that "From earliest times in federal condemnation, additional compensation has been refused where the owner of the fee of one tract had a lease upon another parcel held in fee by a third party, where the leasehold alone was taken." The Court cites as authority for this proposition the case of *U. S. v. Inlots* (1873), D.C. Ohio, F. Cas. 15441a, affirmed, *Kohl v. U. S.*, 91 U.S. 367, 23 L. Ed. 451. It is respectfully submitted to the Court that *U. S. v. Inlots, supra,* is not authority for the view expressed by the Appellate Court. In that case, the Court held only that there was not the unity of use required to make out a case for severance damages. The condemnee owned a livery stable on one side of an alley and leased a building on the opposite side of the alley for use in connection with his livery business. When the leased building was condemned by the United States, the question presented to the Court was the amount of compensation to which the condemnee was entitled. The Court conceded the rule to be that where a part of an estate is taken the Court must ascertain not only the value of the particular portion taken but must also determine the damages to the remaining portion.

The Court held, however, that this rule should not be applied to the facts of that case, observing, "there is no connection whatever between the estate which Mr. Davis has remaining and the one which is taken. He may derive some benefit and make some profit from their use in connection, but there is not that identity and character which warrants the application of this rule."

The Court in that case by implication at least recognized the rule that compensation may be paid in a proper case where there is a sufficient connection between the fee and leasehold properties. On the facts of the case, the Court found only that the connection between the properties was

not of such a character as to warrant the application of the rule.

It is submitted that the Appellate Court erred in holding that the "severance damage theory" applies exclusively to fee lands, particularly in view of the decisions of this Court in the General Motors Case and the Kimball Laundry Case.[3] (See Exhibit A, Appendix, for pertinent quotations from these cases.)

The history of eminent domain law in the United States illustrates the transition from a purely physical conception of property to the conception of property as a word expressing every species of right and interest which may be enjoyed by a person in connection with property and upon which it is possible to put a money value.

The following cases of this Court illustrate the trend toward the latter concept and clearly recognize a more liberal construction of the term "just compensation." *Monongahela Navigation Company v. United States,* 148 U.S. 312, 37 L. Ed. 463, *United States v. General Motors Corporation, supra, United States v. Kimball Laundry Company,* 93 L. Ed. 1420. (See Exhibits A and B, Appendix, for pertinent quotations from these cases.)

It is contended that the view of the Circuit Court of Appeals for the Ninth Circuit limiting the application of the theory of "severance damages" to lands in fee simple in a single ownership fails to consider well-recognized interests in real property less than fee simple. In the instant case, Honolulu Plantation Company operated a sugar plantation as an integrated unit on certain parcels of land held in fee and other parcels of land which the Company held under lease. The Company certainly possessed the legal right to use and enjoy the area under lease by the terms of its leases even though its estate in such lands was less than a fee inter-

[3] *United States v. General Motors Corporation,* 323 U.S. 373, 89 L. ed. 311. Kimball Laundry Company, 93 L. ed. 1420.

est. There is no question here with respect to the contiguity of the lands, both leasehold and fee, which were operated as a single enterprise, nor with respect to the unity of use of such lands. The integrated plantation enterprise may be compared to a public utility system in that the following are common to both types of enterprise:

(1) *Unity of ownership,* the right to use, profit and enjoy, even though certain of such rights in the case of petitioner were in leased lands and easements of lesser duration than fee;

(2) *Contiguity* as evidenced by the connections made by the network of irrigation canals, railroads, roads, irrigation system, and the like;

(3) *Unity of use,* all parts being employed for a common purpose, and each dependent upon the other for the continuance of such use.

If in the instant case, the plantation properties had been owned in fee by the plantation, we believe there is no question but that the condemning authority would have been obligated to pay compensation not only for the property taken but also compensation by way of severance damages suffered by the property remaining. Accordingly, there is no valid reason in law or equity for permitting an unjust enrichment of the United States simply because a part of the lands involved in these proceedings were leased by the Company and the remainder of the lands were owned in fee by the Company. The fact remains that severance damages were suffered by the remaining properties for which no compensation has been paid. An analogous situation would exist if the Government were to condemn one-half of a 13-story office building which covered two lots, one owned in fee, the other on a ground lease. In such a case, to be consistent with its present ruling, the Appellate Court would award compensation for only the one-half of the building located on the fee land. Such an award would,

of course, be impossible to justify on a practical basis or otherwise.

3. The Appellate Court erred, it is submitted, in holding that the Honolulu Plantation Company had no property interest in the lands condemned by virtue of the operation of the condemnation clauses contained in several of the Company's leases and thus was not entitled to any compensation in these proceedings.

In Plantation's Exhibits 9-G (R. 1443), 9-H (R. 1374), 9-I (R. 1468) and 9-J (R. 1500), the condemnation clause in question appears in substantially the following form:

"(2) That in the event the demised premises or any part thereof shall be required, taken or condemned for any public use, then in every such case the estate and interest of the Lessee in the part of the premises taken shall at once cease and determine, and the Lessee shall not, by reason of such taking, be entitled to any claim either against the Lessors or others for compensation or indemnity for the taking of any land or water, or any buildings or other improvements as shall have been made prior to Jan. 1, 1936, and all compensation payable to or to be paid by reason thereof, shall be payable to and be the sole property of the Lessors, and the Lessee shall have no interest in or claim to such compensation or any part thereof whatsoever, . . . Provided, However, . . . and it is further agreed that if such taking shall so affect the remaining premises held by the Lessee under this lease or so affect the operation of the Lessee's remaining lands and tenancies, or the business being conducted thereon as to cause substantial damage to the Lessee, then and in that event the Lessee shall have the right to present and pursue its claim for damages and be compensated therefor so long as such action or the payment of such damages shall not affect nor diminish the compensation payable to the Lessors as stipulated hereinabove. . . ."

This clause, it will be observed, provides that in the event

of condemnation the estate and interest of the lessee in the part of the premises taken shall cease and determine, but there is a further specific provision which provides as follows:

"Provided, However, . . . and it is further agreed that if such taking shall so affect the remaining premises held by the Lessee under this lease or so affect the operation of the Lessee's remaining lands and tenancies, or the business being conducted thereon as to cause substantial damage to the Lessee, *then and in that event the Lessee shall have the right to present and pursue its claim for damages and be compensated therefor so long as such action or the payment of such damages shall not affect nor diminish the compensation payable to the Lessors as stipulated hereinabove. . . .*" (Italics supplied.)

A somewhat similar condemnation clause was construed in the case of *United States v. 8286 Sq. Ft. of Space, Etc.*, 61 F. Supp. 737, 738. In that case the pertinent qualifying provision read as follows:

". . . but nothing herein contained shall deprive Tenant of the right, if any, to receive from the requisitioning or condemning authority award for compensation or loss of or damage *to any of Tenant's tangible property or business,* provided the same is not in diminution of the award or compensation payable to Landlord; . . ." (Italics supplied).

In that case, the Court expressly recognized that if the lessee were able to prove damages, he would not be precluded from such recovery by virtue of the condemnation clause.

In that case (p. 742) the Court remarked as follows:

". . . Reading the clause as a whole it is entirely clear that four things are definitely provided in the event of condemnation. They are (1) the lease expires; (2) the rights of the parties *inter sese* for the future thereupon terminate; (3) the tenant is not to be entitled to any apportionment of the award to be made by reason of the condemnation

except that (4) *if the condemning authority damages the tenant's tangible property or business the latter shall not be deprived of the right, if any, to receive compensation for such loss or damage, provided the same is not in diminution of the award or compensation payable to the landlord.* (Italics supplied)

"True it is that *if* the tenant has a legal right to recover against the condemning authority for loss or damage to his tangible property or business (in which, of course, the landlord is not interested) then the tenant is not deprived of that right by the condemning clause. But this proviso is not applicable under the facts of this case. . . ."

In view of this additional proviso in the condemnation clause, it is submitted that the operative effect of the clause in question is such, insofar as the rights of the lessee are concerned, that if the lessee possesses a legal right to recover against the Government as a condemning authority for damages to the remaining premises held by the lessee under any of these leases or if the taking so affects the operation of the lessee's remaining lands and tenancy as to cause substantial damage to the lessee, then the lessee is not deprived of such a right under the condemnation clause. The damages claimed by the Company in these proceedings are measured by the diminution and depreciation in the value of the properties in its sugar growing and processing enterprise remaining after the taking and which were due to the taking. The right to claim and receive severance damages was by contract transferred from the lessor to petitioner, as lessee. It is the contention of the Company that after the takings the plantation's mill, irrigation system and the plantation's property in general remaining had an uneconomic over-capacity with respect to the cane lands to supply the enterprise, such that the plantation could not be operated by any one as efficiently as before the takings and that such over-capacity depreciated the value of the mill, the irriga-

tion system and the other equipment and properties remaining after the takings.

It is the position of the Company that the qualifying provision of the condemnation clause does not affect the legal right of the lessee to recover for such damages, but on the contrary specifically recognizes that right in favor of the lessee under the lease contract with the lessor. The Company concedes that it has no claim in this proceeding for compensation for the specific physical property condemned and physically taken because of the operation of the condemnation clauses referred to above. However, the Company contends that the qualifying provision of the condemnation clauses expressly permits the lessee to prove and claim any severance damages it suffered by reason of the takings, the Company expressly retaining an interest in the property taken which entitles it to maintain a claim for "severance damages."

4. The decision of the Circuit Court of Appeals for the Ninth Circuit in the instant case is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Baetjer v. United States*, 143 F. 2d. 391, Certiorari denied, 323 U.S. 772, 89 L. Ed. 618. The District Court for the District of Hawaii found that this case came under the rule of the Baetjer case as a matter of fact and law. The Ninth Circuit Court of Appeals held that the Baetjer case was not applicable as a matter of fact and refused to follow the latter case even though the District Court, as the sole trier of fact had found that the Honolulu Plantation Company was entitled to severance damages in the amount of $440,175.00. The rule is well-established that the findings of the Trial Court will not be reversed unless "clearly erroneous." Federal Rules of Civil Procedure, Rule 52 (a). Inasmuch as the findings of the Trial Court were not erroneous but on the contrary were well justified on the basis of the evidence adduced at the trial, the Appellate Court was not justified

in reversing the lower Court. The evidence adduced upon the trial of this cause clearly shows that the remaining properties of the plantation were severely damaged by reason of the takings (R. 1062, et seq.). The plantation was left with properties that had great value to a going concern but had a much less value when large portions of the lands were taken. The loss thus suffered by the plantation was not a fictitious loss nor a hypothetical loss. It was a direct and measurable loss due solely to the condemnation proceedings instituted by the United States and a loss which is compensable under the rule laid down in the *Baetjer* case, *supra*. No compensation has been paid to the Company or anyone else in connection with the damages to the plantation properties. It is respectfully submitted to the Court that the Constitution of the United States protects property owners against such a loss and that petitioner is entitled to be compensated therefor.

5. In the opinion of the Appellate Court it is stated (R. 1637) that the finding of "severance damages" by the Trial Court was based on "unwarranted theorems of the experts." The Court remarked further that "where unwarranted theories of law or assumptions of fact guide the expert and are used as a basis for value by the Court, the evaluation will be set aside and the cause remanded for new findings." It is respectfully submitted that the methods of valuation and the testimony and evidence adduced by this property owner before the Trial Court come well within the four corners of the methods of valuation and the type of evidence referred to and approved by Mr. Justice Frankfurter in *Kimball Laundry v. U. S., supra,* as being proper and receivable by the courts in determining valuation in cases of this type. Likewise the Appellate Court makes certain assumptions of facts wholly beyond the Findings of Fact of the District Court and which cannot be found in the Record or justified by the Record. The language of the Court, with especial

reference to the emotional content of some of its phrases, leads to the conclusion that animosity colored the decision. Assuredly, a calm judicial and dispassionate consideration would not have led to the inclusion of such phrases as:

"By adulteration, the experts . . . evolved a clever amalgam . . ." (R. 1630.)

"By a fantastic process . . ." (R. 1631.)

". . . bizarre results . . ." (R. 1631.)

". . . with superficial cleverness . . ." (R. 1636.)

". . . attempted to distort the true meaning by weasel wording . . ." (R. 1636.)

"The mirage conjured up by the experts and attorneys . . ." (R. 1640.)

In the interest of brevity, petitioner does not at this time desire to set forth its contentions concerning the proof of damages, particularly in view of the fact that this is a matter which is contingent upon a reversal of the decision of the Appellate Court. However, in order to comply with the rule of this Court requiring that all issues upon which decision is requested be presented in the Petition for Certiorari, petitioner here refers to and incorporates in this Petition the points indicated above.

CONCLUSION

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX TO PETITION FOR CERTIORARI

EXHIBIT A

"The critical terms are 'property,' 'taken' and 'just compensation.' It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years,' as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

"In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

United States v. General Motors Corporation, 323 U.S. 373, 89 L. Ed. 311.

"5. The 'market price' of private property taken for public use is the proper measure of compensation due under the Fifth Amendment, if exchanges of similar property have been frequent; but when the property is of a kind seldom exchanged, it has no 'market price,' and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights; *and these considerations have special relevance where property is taken not in fee but for an indeterminate period.*" (Italics supplied.)

Kimball Laundry Company v. United States, Syllabus 5, 93 L. Ed. 1429 (1949).

EXHIBIT B

". . . Our conclusions are, that the Navigation Company rightfully placed this lock and dam in the Monongahela river; that, with the ownership of the tangible property, legally held in that place, it has a vested franchise to receive tolls for its use; that such franchise was as much a vested right of property as the ownership of the tangible property; that the right of the national government, under its grant of power to regulate commerce, to condemn and appropriate this lock and dam belonging to the Navigation Company, is subject to the limitations imposed by the 5th Amendment, that private property shall not be taken for public uses without just compensation; that just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property; and that the assertion by Congress of its purpose to take the property does not destroy the state franchise."

Monongahela Navigation Co. v. United States, 148 U.S. 312, 37 L. Ed. 463.